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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-661

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR GABRIEL FRANCIS ANTELOPE, ET AL.

QUESTIONS PRESENTED

1. Does 18 U.S.C. 1153 classify Indians on the quantum of Indian blood or race, without regard to tribal enrollment, thereby demanding the closest of judicial inspection to withstand constitutional due process requirements?

2. If the above question is answered in the affirmative, has the government proven more

than a rational basis for the discriminatory classification, and, in fact, met the more rigorous "compelling interest" test in order to sustain the racial classification?

3. If the first question is answered in the negative, has the application of 18 U.S.C. 1153 in the case at the bar been so invidiously discriminatory as to be in violation of the Fifth Amendment?

4. Whether 18 U.S.C. 1153 is so vague on its face and in its application that it lacks constitutional certainty as to whom the statute will bring under its provisions for cirminal jurisdiction?

SUMMARY OF ARGUMENT

I.

There is no question, either directly from the face of 18 U.S.C. 1153, or by the various federal and state court interpretations of 18 U.S.C. 1153, but that the term, "Indian" is a racial classification. The clear majority of the lower federal appellate courts that have discussed the statute all agree that it classifies by race or quantum of blood. This Court has never disagreed, but has only continued that interpretation.

Only people who have the requisite percentage of Indian blood can be reached by the criminal jurisdiction of the federal government under

18 U.S.C. 1153. Once a person is born an Indian and lives on the reservation for any reasonable time, it is very difficult, if not impossible, for him to emancipate himself, of his own free will, from that status.

There is no rational governmental interest which will support this racial classification for criminal jurisdiction. However, a rational test is not sufficient for this highly suspect classification. At a minimum, the government is required to present some compelling federal necessity for the classification. None has been offered. Neither the wardship doctrine, nor the plenary powers doctrine meet the burden.

In the case at the bar, 18 U.S.C. 1153 was applied in an invidiously discriminatory manner. It subjected the Respondent to a first degree murder conviction solely on the basis of his race. No other non-Indian, in his position, could have been engulfed by the criminal jurisdiction of 18 U.S.C. 1153.

Congress has the responsibility of writing the laws as it is the representative of the people. However, Congress must be definite and precise in the language so that all citizens may be put on notice of any prohibited conduct. Even more important than the notice requirement, the language must be of sufficient clarity that it is administered in an evenhanded manner to

insure equality and justice for all. The essential terms of a law must be certain.

The term, "Indian" in 18 U.S.C. 1153 is not defined. The administrative discretion which is allowed by this oversight makes the law fit the whim of the administrator, not the will of the people. Vagueness reaches beyond the present fact situation. The vagueness in 18 U.S.C. 1153 violates the Due Process Clause of the Fifth Amendment and requires the Court to strike the statute and allow the Congress to remedy the infirmity.

The lower court's decision must be affirmed.

ARGUMENT

I.

18 U.S.C. 1153 CLASSIFIES INDIANS BY QUANTUM OF BLOOD AND RACE, THEREBY CREATING A SUSPECT CLASSIFICATION DEMANDING STRICT JUDICIAL SCRUTINY.

The essential question presented by this case is whether criminal jurisdiction over Indians is acquired through a statute based on racial classification. The statute rendering jurisdiction over Indians in criminal matters uses racial language on its face. "Any Indian who commits against the person or property of another Indian . . . (18 U.S.C. 1153) (Emphasis supplied.)

Although the statute does define the other requirement for criminal jurisdiction, i.e. Indian country, (18 U.S.C. 1151) it does not define the term, "Indian". The earliest definition of that term by this Court was by United States v. Rogers, 45 U.S. 567 (1846). There the defendant, a white man, had lived on the reservation of the Cherokee tribe for nearly ten years, had married an Indian, had several children, was adopted by the tribe under proper authority and exercised all rights and privileges of a Cherokee Indian. However, the Court refused to allow him to be defined as an Indian for the purposes of criminal jurisdiction.

". . . we think it very clear, that a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian. . . . He may by such adoption become entitled to certain privileges in the tribe. . . . Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe; but of the race generally, --of the family of Indians. . . * * * Whatever obligations the prisoner may have taken upon himself by becoming a

Cherokee by adoption, ... <u>He was still a white man, of the white race</u>. . . ." <u>United States v. Rogers</u>, <u>supra</u>, at 572-573. (Emphasis added.)

In a later case this Court refused to allow a black to be adopted into an Indian tribe for criminal jurisdiction purposes.

> "Although the prisoner, Alberty, was not a native Indian, but a negro born in slavery, <u>it was not disputed that he became a citizen of the Cherokee nation</u>. . . * * * While this article of the treaty gave him the rights of a native Cherokee, <u>it did not</u> . . . <u>make him an Indian</u>, within the meaning of Rev. St. Section 2146. . . ." <u>Alberty v. United States</u>, 162 U.S. 499, 500, 501 (1896). (Emphasis supplied.)

In still a later case, this Court was faced with a determination of how to determine which persons would fall into the guardianship category for protection. It continued the racial definition for the term, "Indian". "Congress has recognized that un-enrolled Creeks of the <u>half-blood or more are tribal Indians</u> subject to federal control." <u>Board of Commissioner v. Seber</u>, 318 U.S. 705, 718 (1942). (Emphasis supplied.)

Felix S. Cohen in his much quoted book on

Indian Law, <u>Handbook of Federal Indian Law</u>, (1942 ed.) at 3, has agreed with the Court's interpretation and has furthered the racial, or per quantum of blood requirement in defining the term, "Indian".

> ". . . the term 'Indian' is one descriptive of an <u>individual who has Indian blood in his veins</u> and who is regarded as an Indian by the society of Indians among whom he lives. Thus, in holding that a white man who is adopted into an Indian tribe does not thereby become an Indian within the meaning of the foregoing statute. . . ." (Indication is that the foregoing statute referred to is 18 U.S.C. 1153.) (Emphasis supplied.)

The Association on American Indian Affairs' book, <u>Federal Indian Law</u>, (1966) at 8, which is a later manual used by the Interior Department and its office for Indian Affairs has clung to the requisite of Indian blood.

> "Within the meaning of those various statutes which though applicable to Indians do not define them, the courts, in defining the status of Indians of mixed Indian and other blood, have largely followed the test laid down in <u>United States v. Rogers</u>, to the

effect that an individual to be considered an Indian must not only have some degree of Indian blood but must in addition be recognized as an Indian." (Emphasis supplied.)

The major legal encyclopedias have defined Indians for criminal jurisdiction under 18 U.S.C. 1153 in accord with the requirement of racial characteristics and a certain quantum of Indian blood.

42 C.J.S. Section 10(c) at 664 - "A tribe of Indians may admit aliens to membership in the tribe, and a person so adopted acquires all the rights and incurs all the obligations of a member of the tribe. He does not however, . . . become an 'Indian' within the meaning of the statutes." (Emphasis supplied.)

41 Am. Jur. 2d Section 1 at 833 - "The term 'Indians,' as ordinarily used when referring to persons in the United States, is understood to refer to the members of that race of men who inhabited North America when it was discovered by Caucasians; it describes a person of Indian blood, and a white man or a negro who is adopted into an Indian tribe does not become an Indian."

Both the lower federal courts and the state supreme courts have interpreted 18 U.S.C. 1153 in exactly the same manner as previously explained.

In Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (1965), the federal court used this language for the establishment of the meaning of the term, "Indian".

". . . it seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood."

Later in the opinion the court explained more fully its meaning.

"It is plain the Congress . . . has deemed it expedient, and within its power, to classify Indians according to their percentages of Indian blood. * * * Indians can only be defined by their race." Id. at 814.

The Arizona State Supreme Court has employed the same definition as late as 1975, in State v. Atteberry, 110 Ariz. 354, 519 P2d 53,54 (1974). To determine whether the defendant came within the purview of 18 U.S.C. 1153 as an Indian, the court followed this test:

". . . the test of Indian status has

depended primarily on two things (a) a substantial percentage of Indian blood, and (b) recognition as an Indian."

The impact of these earlier United States Supreme Court cases and the number of federal cases using the racial classification rule of definition allowed the Court in Kills Crow v. United States, 451 F2d 323, 325 (1971), to dispose of the question of racial classification by 18 U.S.C. 1153 laconically in these words:

". . . it hardly needs to be observed that section 1153 is founded upon a racial classification. . . ."

This conclusion is reached by two approaches. First, it is impossible for non-Indians to be classified as Indians for purposes of 18 U.S.C. 1153. Secondly, it is not always possible for Indians to disenfranchise themselves from this racial category. This is especially true of the person who is a full-blooded Indian with all the normal physical characteristics of the race and has either been born on the reservation or resided on a reservation for any length of time. Non-Indians may be adopted for several burdens and privileges of the tribe in various contexts, but never to be subjected to criminal jurisdiction under 18 U.S.C. 1153. Only those people who could biologically be classified as Indians

can receive the sweeping effect of 18 U.S.C. 1153.

The Appellants suggest that the term "Indian" is nothing more than a political division, or "social-political group". They contend that, although one of non-Indian ancestry may not be able to become an Indian, an Indian can emancipate himself from the tribe and therefore escape the criminal jurisdiction of 18 U.S.C. 1153. The suggested procedure is by removal of one's name from the tribal enrollment records.

This is not always the case. A complete and detailed examination of both the lower federal and the appellate court decisions will readily reveal that seldom has a person with racial characteristics of an Indian not been held under federal criminal jurisdiction. Some courts have even denied that tribal enrollment should be considered. Felix S. Cohen suggested that not only was tribal enrollment indeterminative, but supervision of an Indian agent and citizenship were equally indeterminative.

"On the other hand, an Indian does not lose his identity as such within the meaning of federal criminal jurisdiction acts, even though he has received an allotment of land, is not under the control or immediate supervision of an Indian agent, and

has become a citizen of the United States and of the state in which he resides." Cohen, Handbook of Federal Indian Law, (1942 ed.) at 3.

In Ex Parte Pero, 99 F2d 28, 31 (1938), the court concluded that the child of an Indian full-blood mother, and a one-half blood Indian father was an Indian, eventhough he was not enrolled in any tribe. The test expressed by the court consisted of these three ingredients: (1) preponderance of blood, (2) habits of the person, and (3) substantial amount of Indian blood plus a racial status in fact as an Indian.

This decision was followed only recently in 1974 by the federal court in United States v. Ives,[1] 504 F2d 935. The defendant was convicted of murdering a non-Indian on an Indian reservation thereby coming under 18 U.S.C. 1153. He was identified as an Indian, eventhough he had voluntarily and on his own initiative tried to have his name removed from the tribal rolls a considerable time before the commission of the

[1]Ives v. United States was granted certiorari (421 U.S. 944), the judgment was vacated and remanded for consideration of the psychiatric examination issue of defendant's competency to stand trial as explained by the court in Drope v. Missouri, 95 S. Ct. 896.

homocide. The court held nevertheless, that: ". . . enrollment or lack of enrollment is not determinative of Ives' status as an Indian." Ives v. United States, supra, at 953.

In In Re Carmen's Petition, 165 F. Supp. 942 (1958) aff'd per curiam sub nom; Dickson v. Carmen, 270 F2d 809 (1959) cert. denied, the defendant had been convicted for the murder of an Indian within Indian country, bringing into play 18 U.S.C. 1153 and 18 U.S.C. 1111. The court refused to accept the negation of tribal relations as bearing on the status of the defendant being an Indian or not.

"Respondent also questions the applicability of the Major Crimes Act on the grounds that petitioner although an Indian by blood, is emancipated to such an extent that he is not an Indian within the meaning of the Act. None of the decisions relied upon by respondent support this contention." In Re Carmen's Petition, supra, at 946.

The court did not consider whether an Indian can be emancipated so as to escape the Act. Instead, it cited Davis v. United States, 32 F2d 860 (1929) as standing: "For the proposition that tribal relations have no bearing on an Indian's status as an Indian within the meaning of the Ten Major Crimes Act." In Re Carmen's Petition, supra, 947.

There can be little question that 18 U.S.C. 1153 is a racial classification in using the term, "Indian". Tribal enrollment is not used by all courts to determine if the accused is either in or out of the so-called "social-political group" and tribal enrollment is most certainly not determinative of his racial status as an Indian. It should be pointed out that determination of who is enrolled on the tribal rolls is within the discretion of the Department of the Interior and its offices. The guidelines for such enrollment by those offices are also on a quantum of blood analysis.

"The Indian tribes have original power to determine their own membership. Congress has the power, however, to supersede that determination. . . * * * Congress may authorize an administrative body to make a roll descriptive of the persons thereon so that they might be identified. . . * * * Congress may disregard the existing membership rolls of a tribe and direct that the per capita distribution be made upon the basis of a new roll, even though such act may be inconsistent with prior legislation, treaties, or agreements with the tribe. (See also 25 U.S.C. 163) Cohen's Handbook on Federal Indian Law, supra, at 98-99.

It is for the above described reasons that the lower court in the case at the bar said: "We here emphasize that the sole basis for the disparate treatment of appellants and non-Indians is that of race." (Pet. App. 6a) It is because of this racial classification for criminal jurisdiction by 18 U.S.C. 1153 that this Court must carefully scrutinize in the strictest of manners, the statute in question.

II.

THE RACIAL CLASSIFICATION OF 18 U.S.C. 1153 RESULTS IN INVIDIOUS DISCRIMINATION AND CAN STAND CONSTITUTIONAL MUSTER ONLY IF A COMPELLING FEDERAL INTEREST IS SHOWN BY THE GOVERNMENT WHICH NECESSITATES THIS RACIAL CLASSIFICATION.

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is violative of due process. Jimenez v. Weinberger, 417 U.S. 628 (1974); Johnson v. Robison, 415 U.S. 361 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954).

The Court in Bolling v. Sharpe, supra, held that the Fifth Amendment applies to the federal government much like the Fourteenth does to the states.

"Classification based solely upon race must be scrutinized with particular

care, since they are contrary to our traditions, and hence constitutionally suspect. As long ago as 1896, this Court declared the principle, 'that the Constitution of the United States, in its present form, forbids . . . discrimination by the General Government, or by the States, against any citizen because of his race.'"
Bolling v. Sharpe, supra, at 499.

When a racial classification is seen as being unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it will also be seen as unconstitutional under the due process requirement of the Fifth Amendment. To allow a racial classification statute to stand, the government must show some compelling interest in the classification.

This Court in Hunter v. Erickson, 393 U.S. 385, 392 (1969) explained that:

". . . racial classifications are constitutionally suspect and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications."

The point of the case and the language was that more than the traditional reasonable relationship test would be needed for these, the most abhorent of classifications. The suspect

criteria has applied not only to race but to alienage, national origin, and religion as well.

This Court has noted that the "traditional indicia of suspectness" are: (1) a class determined by characteristics which are solely an accident of birth; or (2) a class subjected to such a history of purposefully unequal treatment or relegated to a position of such political powerlessness, as to command extraordinary protection from the majority. Johnson v. Robison, 415 U.S. 361 (1973). The present classification fits both categories: the class is determined by accident of birth, and the class has been subjected to a history of unequal treatment resulting in political powerlessness.

Justice Harlan in Hunter v. Erickson, supra, at 393, described what might be necessary to sustain the required heavy burden of justification. "Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by state interests of the most weighty and substantial kind."

When the racial classification by statute is concerning a criminal statute, i.e. rendering criminal jurisdiction over a person, then the burden of sustaining it is even greater, and possibly incapable of being met. Justice Stewart in McLaughlin v. Florida, 379 U.S. 184, 198 (1964) explained it in this fashion:

"It is simply not possible for a state law /or in this case a federal law/ to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."

Again it should be noted that the court of appeals found:

"That the sole basis for the disparate treatment of appellants and non-Indians is that of race." (Pet. App. 6a)

Although the criminality of the act per se is not based on race, i.e. 18 U.S.C. 1111 is not racial in classification, the jurisdictional power which brings the defendant under 18 U.S.C. 1111 is based on race, thereby creating an identical result as in McLaughlin, supra.

Appellants argue that the compelling federal interest for this racial classification is two-fold: (1) the plenary power of Congress over Indians, and (2) the government's trust responsibility for the Indians.

Congress has plenary power over Indians and a wide-scope of authority over their affairs. However, Congress in exercising its many powers over Indian and Indian affairs is subject to all the limitations contained in the Bill of Rights. In 1938 this Court, after noting the plenary power of Congress in this area added:

"It is appropriate first to observe

that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to Constitutional limitations. . . ." United States v. Klamath & Moada Tribes of Indians, 304 U.S. 119, 123 (1938).

Eight years later, Chief Justice Vinson speaking for the Court said:

"The power of Congress over Indian affairs may be of a plenary nature, but it is not absolute." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946).

When Congress acts in this area as elsewhere, those congressional acts which use racial classification are judicially suspect and must show some compelling federal interest to allow the classification, or be found unconstitutional.

Professor Norman Vieira in his often quoted article from the Michigan Law Review, 67:1553, "Racial Imbalance, Black Separatism, and Permissible Classification by Race", (1969), points out the origin of Congress' power over Indians. Article 1, Section 8, clause 3 of the United States Constitution, "to regulate Commerce . . . with the Indian Tribes." He goes on to explain that this power is not boundless.

"This use of racial criteria cannot be explained and, hence, limited by the

constitutional grants of power to regulate Indian affairs. Consideration of race has not been confined to implementing treaties with Indian nations, ... Although federal control over United States possessions and over commerce with Indian tribes permits extensive regulation, this federal power should no more authorize racial distinctions than does the corresponding state power to regulate local commerce and local property." Mich. L. Rev. 67:1553, supra.

The trust responsibility must remain subject to constitutional limitations in recognition of Indians' inherent rights as citizens of the United States. This Court confirmed th't position in Keeble v. United States, 412 U.S. 205, 211, 212 (1973).

> "In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under /federal criminal/ laws and taught to regard life and the personal property of others.' 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon). This is emphatically not to say, however, that Congress intended

> to deprive Indian defendants of procedural rights guaranteed to other defendants, or to make it easier to convict an Indian than any other defendant." (Emphasis supplied.)

It was on this same basic reasoning that the Federal District Court of New Mexico in United States v. Boone, 347 F. Supp. 1031 (1972) held 18 U.S.C. 1153 to be a denial of equal protection: ". . . the defendant is subject to conviction upon a lesser burden of proof. . . ."

The Court went on to find:

> "In the case at bar, the racial differentiation in section 1153 results in disadvantages to the defendant and it is difficult to see any benefit to Indians generally. The racial classification is not reasonably related to any proper governmental objectives and is therefore arbitrary and invidious in violation of the due process clause of the Fifth Amendment." United States v. Boone, supra, at 1035.

The facts of the case at bar result in an identical conclusion. Mr. Antelope was subjected, because of the racial classification, to a very serious disadvantage in defending himself.

The federal murder statute, 18 U.S.C. 1111, made applicable to Indians by 18 U.S.C. 1153, contains what is commonly known as the felony

murder rule. Mr. Antelope was convicted of murder in the first degree under this felony murder rule.

The felony murder rule had its origin and rationale in past times when all felonies were punishable by death, therefore, it mattered little whether the felon was executed for the underlying felony or the taking of a human life. See, LaFave and Scott, Criminal Law, 545-561 (West 1972). It cannot be disputed that the doctrine has been in disfavor for decades and has been limited or abolished in many jurisdictions.

The practical result of the application of the felony murder rule in the present case was that the Government did not have to prove beyond a reasonable doubt that the killing was "willful, deliberate, and premeditated." The jury instructions merely incorporated the robbery charge in Count II along with the "intentional, unintentional, or accidental" killing of a human being while perpetrating a robbery.

Idaho repealed its felony murder statute in 1973. Idaho Session Laws, 1973, Ch. 276, Sec. 1, 588. To be convicted of first degree murder under the Idaho Code, the prosecution must prove beyond a reasonable doubt that the killing was "willful, deliberate, and premeditated." Idaho Code 18-4003.

It is obvious that the burden of proof under the federal definition of first degree murder is much less onerous than under the Idaho Code. The Government, in the present case, did not need to prove, nor did they prove, that the killing of Mrs. Emma Johnson was "willful, deliberate, and premeditated" under 18 U.S.C. 1111. In addition, because of the felony murder instructions, the Government was not required to prove, and did not prove, that Mr. Antelope actually caused the death of Mrs. Emma Johnson. What guardian or trustee would subject its beneficiaries to such harsh judgments?

The idea of the wardship doctrine developed from dicta of Chief Justice Marshall's opinion in Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The Cherokee Nation had attempted to invoke the Court's original jurisdiction over controversies, "between a State . . . and foreign States." (United States Constitution, Article III, Section 2) The Indians' contention was rejected and they were characterized as a "domestic dependent nation," instead. The dicta creating the wardship doctrine stated: "/The Indians/ are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." Cherokee Nation v. Georgia, supra.

In United States v. Kagama, 118 U.S. 375 (1886) the Court drew from Marshall's dictum to extend the wardship concept to allow Congress

virtually plenary power over the Indians.

This antiquated doctrine and the racial imputs from congressional acts and early court decisions can be illustrated with the language from these few cases.

> "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection. . . ." United States v. Thomas, 151 U.S. 577, 585 (1893).

In United States ex rel. Standing Bear v. Crook, 25 Fed. Cas. 695, No. 14891 (1879), the court had to resort to a Webster dictionary to determine if an Indian was a person so as to employ a writ of habeas corpus.

> "Webster describes a person as a 'living soul, a self-conscious being; a moral agent; especially a living human being; a man, a woman or child; an individual of the human race.' This is comprehensible enough, . . . to include even an Indian."

The motives of Congress can be seen in the Congressional Record during the passage of the 1909 Amendment to 18 U.S.C. 1153, which limited the death penalty exclusion to those who raped Indian women in Indian country. "The morals of Indian women are not always as high as those of white women and consequently the punishment should be lighter for an offense against her." (43 Cong. Rec. 2595-96) (1909).

Although the Court has repeated several times that they would not examine the wardship doctrine in these changing times, (See, Board of County Commissioners v. Seber, 318 U.S. 705 (1943); Re Heff, 197 U.S. 488 (1905) and has patiently waited in vain for Congress to act, surely it will not allow that superannuated purpose of wardship in and of itself to be the compelling test which allows an Indian to be convicted of first degree murder more easily than a non-Indian.

> One commentator has put it this way: "It is hard to imagine arguments which would validate such discrimination against Indians. Certainly, the status of wardship is not sufficient by itself." See, "Indictment Under the 'Major Crimes Act' - An Exercise in Unfairness and Unconstitutionality", 10 Ariz. L. Rev. 691 (1968).

The Eighth Circuit in United States v. Big Crow, 523 F2d 955, 959 (1975) cert. denied, explained it in this manner.

> "While the Supreme Court has approved legislation singling out Indians for special treatment, such special treatment must at least be 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . .' It is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection. We further question whether the rational basis test is the appropriate standard where racial classifications are used to impose burdens on a minority group rather than, as in Morton v. Marcari, 417 U.S. 535 (1974), to help the group overcome traditional legal and economic obstacles. It is the generally settled rule that the government bears the burden of showing a compelling interest necessitating racially discriminatory treatment. * * * Under the circumstances, we are constrained to hold that 18 U.S.C. 1153 can not constitutionally be applied so as to subject an Indian

> to a greater sentence than a non-Indian could receive for the same offense."

If this wardship position is a protected status, it is a peculiar one in light of the additional jeopardy in which it placed Mr. Antelope. He has been placed at a distinct and serious disadvantage solely because of the fact that he is an Indian. Had he been non-Indian, he would not have been tried in the United States District Court. New York ex rel. Ray v. Martin, 326 U.S. 496; United States v. McBratney, 104 U.S. 621. Had Mr. Antelope been non-Indian he would not have been subject to the felony murder rule. Had Mr. Antelope been non-Indian, the Government would have had to prove that his actions were the actual cause of death, and that such killing was "willful, deliberate and premeditated" in order to have convicted him of first degree murder.

In United States v. Cleveland, 503 F2d 1067, 1071 (1974), the Ninth Circuit in an 18 U.S.C. 1153 case held that:

> "The sole distinction between the defendants who are subjected to state law and those to whom federal law applies is the race of the defendant. No federal or state interest justifying the distinction has been suggested, and we can supply none."

The same conclusion was reached in United States v. Boone, 347 F. Supp. 1031, 1035 (1972).

> "Moreover, the government has offered no justification for the provision other than a general reference to Congress' plenary power over Indians. Hopefully, that power does not allow Congress to make arbitrary distinctions, particularly in the area of criminal law."

The Indians protected status cannot be employed to make their prosecution for murder in the first degree easier than that of non-Indians under identical circumstances, either under the plenary power or the wardship doctrines.

The purpose of the various acts under the Ten Major Crimes Act was to bring Indians under federal jurisdiction to permit the prosecution of Indians in the same manner as all other people:

> ". . . shall be subject to the same laws and penalties as all other people committing any of the above offenses." (18 U.S.C. 1153)

It cannot now be used to discriminate against Indians.

Indians' rights to due process and equal protection require a more even-handed approach. The racial classification of 18 U.S.C. 1153 requires a compelling federal interest. Since not even a rational interest has been shown,

the classification must be seen as invidiously discriminatory and therefore, unconstitutional.

It needs to be noted at this point that there has been no disagreement among the various appellate federal decisions as to the issue of racial classification in 18 U.S.C. 1153. United States v. Cleveland, supra; United States v. Analla, 490 F2d 1204 (1974); United States v. Boone, supra; Henry v. United States, 432 F. Supp. 1031 (1972); Gray v. United States, 394 F2d 96 (1967); Kills Crow v. United States, supra; United States v. Maestas, 523 F2d 316 (1975); United States v. Big Crow, 523 F2d 955 (1975).

As was pointed out in United States v. Boone, supra, at 1035:

> "Other federal appellate cases considering equal protection attacks on section 1153 have sustained the statute either because the distinction challenged was beneficial to Indians generally, Gray v. United States, 394 F2d 96, or because the defendant in the case suffered no disadvantage as a result of the distinction involved."

Or as was pointed out in United States v. Analla, supra, the difference in wording between the federal statute and the comparable state statute was only a difference in nomenclature, and not substantive law, with the same elements required in both, with the same burden of proof.

The disparity between Idaho Code 18-4003 and 18 U.S.C. 1111 is much more than nomenclature. Mr. Antelope suffered serious disadvantages.

This Court expressed it most clearly in McLaughlin v. Florida, supra, at 192, that where the statute uses racial classification it is suspect and must meet the compelling interest test, and, "Without such justification the racial classification . . . is reduced to an invidious discrimination."

III.

EVEN CONSIDERING 18 U.S.C. 1153 TO BE CONSTITUTIONAL, THAT THE RACIAL CLASSIFICATION COMPELLING INTEREST TEST IS MET, THE APPLICATION OF 18 U.S.C. 1153 IN THE CASE AT THE BAR IS INVIDIOUSLY DISCRIMINATORY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

This Court early in 1886 in Yick Wo v. Hopkins, 118 U.S. 356, 373, held that application of constitutional laws in a discriminatory manner was a denial of equal protection and due process under the Constitution.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority . . . so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

18 U.S.C. 1153, if it is seen to meet the compelling interest test, may be held constitutional on its face. However, in the facts before this Court it is quite obvious that the Respondent is being treated in a discriminatory manner.

This Court has continuously held that the laws of the state have jurisdiction over criminal offenses committed on Indian reservations by non-Indians. New York ex rel. Ray v. Martin, 326 U.S. 496; Draper v. United States, 164 U.S. 240; United States v. McBratney, 104 U.S. 621; Williams v. United States, 327 U.S. 711. The language from Williams, supra, at 714, typifies the holdings: ". . . the laws and courts of the State of Arizona . . . have jurisdiction over offenses committed on this reservation between persons who are not Indians. . . ."

The victim of the homocide in question was a non-Indian. Had Mr. Antelope also been a non-Indian, there would be little question but that Idaho substantive law would apply and not 18 U.S.C. 1111. The difference is not due to geographical location. The location in either the

case at the bar or the hypothetical case with the non-Indian assailant would fall within the definition of "Indian Country" as expressed in 18 U.S.C. 1151. The result in this case is not the same as normally happens in federal enclave cases. The normal rule is geographical; the rule in the present case is purely racial. The application of 18 U.S.C. 1153 and correspondingly 18 U.S.C. 1111, the murder felony rule would apply only to Indians who found themselves in exactly the same position as Mr. Antelope; never to non-Indians.

It was in Hunter v. Erickson, 393 U.S. 385, 391 (1969) that this Court said:

> "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."

The statute, as applied, was held unconstitutional. This case requires the same result.

This precise problem was cited most recently in a lower federal court decision: United States v. Tyndall, 400 F. Supp. 949 (1975). The court dismissed an indictment for assault with intent to inflict great bodily injury as not being within the Major Crimes Act. In footnote 6, it stated a real concern over the constitutionality of 1153 in application: "The Court also has serious reservations as to whether

the Major Crimes Act can withstand a 'denial of equal protection as applied' attack . . . ."

This serious reservation must be resolved by this Court now. The resolution is that 18 U.S.C. 1153, as applied, denied Mr. Antelope the equal protection of the land and his rights to due process as guaranteed under the United States Constitution solely on a racial basis.

IV.

IN THE ALTERNATIVE, 18 U.S.C. 1153 IS UNCONSTITUTIONALLY VAGUE IN THE ADMINISTRATIVE DISCRETION ALLOWED AS TO THE DEFINITION OF THE TERM "INDIAN."

The lower appellate court disapproved of allowing the government to circumbent discriminatory laws by accomplishing through discriminatory jurisdiction what it could not do through discriminatory statutory coverage.

> "The government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage . . . . To hold otherwise would allow the government to run roughshod over the Fifth Amendment in the name of jurisdictional sacrosanctity, employing jurisdiction as an inviolate tool. (Pet. App. 12a).

There is nowhere in Chapter 53 of Title 18 of the United States Code a definition of the term, "Indian". The Code is careful to include a detailed description of "Indian Country" (18 U.S.C. 1151), which definition has not avoided several legal interpretative court actions. Mattz v. Arnett, 412 U.S. 481 (1973); United States v. Chavez, 290 U.S. 357 (1933).

The failure by the Congress to define the term "Indian" causes ever great constitutional problems of certainty. It must be noted at this point that 18 U.S.C. 1111 is not being challenged on the vagueness charge; only 18 U.S.C. 1153 is being challenged.

Justice Douglas in United States v. Cardiff, 344 U.S. 174 (1952) explained the vice of vagueness as it related to the lack of identification of the person to whom a criminal statute, or in this case criminal jurisdiction, would apply:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula. (Emphasis added.)

Not only must criminal activity be defined with definiteness and certainty, but criminal jurisdiction must inevitably fit the same standard.

This is not only a common-law requirement but is now regarded as an element of due process. The underlying principle is that people are entitled to be informed not only as to what the state or federal government forbids, but also as to whom the law applies.

An example of the confusion which can arise is typified in United States v. Red Wolf, 172 F. Supp. 168, 172 (1959). In this case the defendants were 18 and 19 year old boys who were charged with the rape of consenting 17 year old Indian girl on an Indian reservation. Under Montana law any sexual intercourse with a female, not the wife of the perpetrator, under the age of 18 was rape. However, under 18 U.S.C. 2032 the age was set at 16. The entire question of criminal conduct was based on whether or not the defendants were to be charged under federal or state jurisdiction.

The participants were not on notice of any violation of the law, and were unable to determine which law would apply. The boys could not determine whether the girl would be recognized as an "Indian" by the prosecutors and therefore determine whether the act would be unlawful.

Fortunately the court dismissed the charge, for as it held a contrary holding would have required that: "An Indian would be held to a greater degree of responsibility than a white man. * * * It is extremely unlikely that Congress

intended such a discriminatory result."

A statute must not be so vague as to allow the prosecutors, police, or courts the power to determine the law for themselves. The due process clause demands that criminal statutes and criminal jurisdictional statutes be established by elected representatives and applied uniformly to all suspects; standards which are so vague that they may change from one case to the next allows prosecutors to take the law into their own hands and are more nearly individual whims than statutes.

18 U.S.C. 1153 is such a statute. It allows the prosecutor to identify the perpetrators as Indians or non-Indians, at his will, and prosecute under the easier statute.

An Indian can not always remove his name from the tribal membership rolls--to emancipate himself from a tribe. United States v. Ives, 504 F2d 935 (1974). He may still be regarded as an Indian because of his physical racial characteristics.

The argument raised by the Appellants as to the identification of the term, "Indian" is indicative of the different interpretations that have been precipitated by prosecutors in the past. These past results only reveal the present and future quagmires an Indian, under 18 U.S.C. 1153, must wade through.

This lack of identification of who is an Indian, leaves prohibitive discretion with the administrators of the laws in violation of due process as required under the Fifth Amendment. It renders 18 U.S.C. 1153 unconstitutionally vague.

The problem can be envisioned in yet another example. If a white or other non-Indian were to be adopted by an Indian tribe and be accepted by all outward appearances and authority as an Indian, but lack the requisite percentage of blood, how would a prosecutor treat him? The prosecution would be at liberty to accept or reject any tribal enrollment by classifying it as non-determinative, and proceed with the prosecution under the more facilitating jurisdiction. The result is as one commentator expressed it: "Reminiscent of the kind of discrimination that occurred prior to Erie v. Tompkins, 304 U.S. 64 (1938), where non-residents were allowed to take advantage of the federal common law and residents were compelled to rely on the law of the state." See, "Indictment Under the 'Major Crimes Act' - An Exercise in Unfairness and Unconstitutionality", 10 Ariz. L. Rev. 691, (1968).

It was in Niemotko v. Maryland, 340 U.S. 268, 285 (1951) that this Court said:

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance

an action appears not arbitrary does not save the validity of the authority under which the action was taken."

Even though it seems clear that Mr. Antelope, if it were ever determined by a jury that he did cause the death of Mrs. Johnson, was on notice that such action was prohibited by law and that perhaps no arbitrary action was taken in this case at the bar: "The Court can upset the conviction . . . by allowing defendant to invoke hypothetical unconstitutionalities not actualized in his case . . . ." See, "The Void-For-Vagueness Doctrine in the Supreme Court", University of Pa. L. Rev. 190:67 105 (1960).

The unconstitutional vagueness must not be allowed to stand for future Indians in not so clear a situation.

The vagueness of the definition of the term, "Indian" in 18 U.S.C. 1153 fits both categories used by this Court in the past to cause it to be rendered unconstitutional: (1) It does not give sufficient notice to citizens of the United States, and (2) It allows overbroad administrative discretion. It is impossible to always be certain who will be classified as an Indian and who will not, therefore, 18 U.S.C. 1153 must be found unconstitutional and it must be sent back to the Congress for remedy since it is not within the power and authority of this Court to rewrite the statute in a manner which would

remove these detailed infirmities.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals be affirmed.

ALLEN V. BOWLES,
Counsel for Respondent.

July 1976.

CERTIFICATE OF SERVICE

All parties required to be served have been served by depositing three (3) printed copies of Brief for Gabriel Francis Antelope, et al. in the United States post office with air mail postage prepaid, addressed to Mr. Robert M. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, on the 29 day of July, 1976.

Allen V. Bowles

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